

In The Matter Of:

Healthy Advice Network LLC vs. Comtextmedia Inc.

Michael Berning

March 6, 2014

MERRILL CORPORATION

LegaLink, Inc.

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Healthy Advice Network LLC vs. Comtextmedia Inc.
Michael Berning March 6, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

HEALTHY ADVICE NETWORKS,)	
LLC,)	
)	
Plaintiff,)	
)	
-vs-)	No. 1:12-cv-00610
)	
CONTEXTMEDIA, INC.,)	
)	
Defendant.)	

Discovery deposition of MICHAEL BERNING,
taken before MARINA MOGILEVSKY, C.S.R., and Notary
Public, pursuant to the Federal Rules of Civil
Procedure for the United States District Courts
pertaining to the taking of depositions, at 222 North
LaSalle Street, 25th Floor, in the City of Chicago,
Cook County, Illinois, at 5:00 o'clock p.m. on the 6th
day of March, 2014.

* * o o o * *

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1 There were present at the taking of this deposition
2 the following counsel:

3
4 FROST BROWN TODD, LLC by
5 MR. GRANT S. COWAN
6 3300 Great American Tower
7 301 East Fourth Street
8 Cincinnati, Ohio 45202
9 (513) 651-6831
10 gcowan@fbtlaw.com

11 appeared on behalf of the Plaintiff;

12 SIDLEY AUSTIN, LLP by
13 MR. RICHARD J. O'BRIEN
14 Bank One Plaza
15 10 South Dearborn Street
16 Chicago, Illinois 60603
17 (312) 853-7000
18 robrien@sidley.com

19 appeared on behalf of the Defendant.

20 ALSO PRESENT:

21 Mr. Manuj Lal

22 * * o O o * *
23
24

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10	EXHIBITS	
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12	Deposition Exhibit 60	30
13	(E-mail - Context Bates 0021233)	
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	* * * * *	

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1 MICHAEL BERNING,
2 called as a witness herein, having been first duly
3 sworn, was examined and testified as follows:

4 EXAMINATION

5 by Mr. Cowan:

6 MR. COWAN: Q Will you state your name, please.

7 A My name is Michael E. Berning.

8 Q And your address, Mr. Berning?

9 A 1624 West Division, Chicago, Illinois.

10 Q We introduced ourselves earlier. I'm Grant
11 Cowan. I'm representing the plaintiff in this lawsuit
12 PatientPoint, or sometimes called HAN or Healthy Advice.
13 They're all really the same. I'm here today to take
14 your deposition.

15 Have you ever given a deposition before?

16 A Nope.

17 Q All right. The ground rules are pretty simple,
18 I think.

19 The first rule is to make sure you understand
20 my question. If I ask you a question which is confusing
21 to you in any way, let me know. And I'll be happy to
22 correct the problem. Fair enough?

23 A Fair enough.

24 Q And the second rule is to answer, as you've been

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1 doing thus far, orally, as opposed to a nod of the head
2 or an uh-huh, which is difficult for the court reporter
3 to pick up. Okay?

4 A Sure.

5 Q And then, finally, I don't think we're going to
6 be here very long; but if you need to take a break, let
7 me know. And I'll work myself to a convenient stopping
8 position. Okay?

9 A Okay.

10 Q Any reason why you don't believe you can testify
11 truthfully and honestly today? And let me get to the
12 heart of that. Are you on any medication that might
13 interfere with anything?

14 A No, sir.

15 Q Okay. Did you do anything to prepare for
16 today's deposition?

17 A I met with my counsel, Mr. O'Brien.

18 Q Anything else? Did you talk to anybody at
19 ContextMedia outside the presence of counsel?

20 A No.

21 Q When did you work for Context?

22 A It would have been mid 2009 through
23 September 11th of 2012.

24 Q Mid 2009 did you say?

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1 A Yeah. I don't recall the exact starting date.

2 Q Okay. To September --

3 A 2012.

4 Q And why did you leave CM or Context?

5 A To travel with my wife for a couple years. And
6 I had been there for three-plus years, so.

7 Well, not quite, but.

8 Q Was it an amicable parting?

9 A Yes.

10 Q You weren't terminated or severed?

11 A No.

12 Q Do you still stay in touch with anyone from
13 Context?

14 A Yes.

15 Q Who?

16 A Travis Kemp.

17 Q Anyone else?

18 A No.

19 Q When was the last time you talked to Mr. Shah?

20 A It would have been probably 9-10 of 2012.

21 Q The same for Ms. Agarwal, if I'm pronouncing it
22 right?

23 A I don't recall.

24 Q Other than Mr. Kemp, have you maintained any

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1 sort of regular contact with anybody at Context since
2 leaving there?

3 A No.

4 Q What was your title when you were with Context?

5 A Media operations manager.

6 Q And what were your duties and responsibilities
7 as media operations manager?

8 A Make sure that the programming ran where it was
9 supposed to run. Making sure the ads played at the
10 duration -- or, excuse me, at the frequency they were
11 supposed to play within the loop.

12 Q Anything else?

13 A Creating some content. Creating slides for our
14 members specific to their practices.

15 Q I'll come back and kind of focus in on some of
16 these, but can you think of anything else that dealt
17 within the purview of your duties and responsibilities?

18 A Yeah, that's it.

19 Q Okay. And were you the media operations manager
20 the entire time?

21 A Yes.

22 Q So your position or your title didn't change?

23 A No.

24 Q And were your duties and responsibilities

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1 essentially the same from when you started to when you
2 left?

3 A Yes.

4 Q So kind of on a day-to-day basis or a
5 week-to-week basis in terms of programming, making sure
6 the programming was right, what did you do? Just try to
7 explain that to me.

8 A Well, 12 months a year, we had new programming
9 once a month. I'd say two weeks out of each month I
10 would spend putting together our loops. Member services
11 would occasionally submit a form, where I would create
12 informational slides for the practices.

13 Q When member services gave you a form for you to
14 create an informational slide for the practices, would
15 that be a situation where they were asking you to create
16 a practice-specific slide?

17 Is that confusing to you?

18 A Yes.

19 Q Okay. Under what circumstances would you
20 receive a request from member services to create a slide
21 for a practice?

22 A A member would call member services. They would
23 say, I would like information about ankylosing
24 spondylitis on our screens.

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1 Q And then how would you develop the slide for the
2 screen?

3 A On most occasions, they'd submit their own
4 information to us. On occasion, I think, I looked to
5 the marketing department.

6 Q To provide the substance or the content?

7 A Yes.

8 Q When the practice actually provided the
9 information to Context, what format did you put it into
10 to send it back to them? What was the slide?

11 A It was a video format. We used QuickTime H264
12 as our delivery format. Generally, we didn't send it
13 back to them.

14 Q You would -- The next time the loop was updated,
15 you would put it in the loop so that they'd then have
16 the updated content?

17 A Yes.

18 Q During the time you worked there, were any of
19 the -- was any of the content a static slide? And by
20 that I mean, something that would look like a PowerPoint
21 slide?

22 A Yes.

23 Q And would that be true for DHN and RHN?

24 A Yes.

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1 Q What percentage of a 90-minute loop was made up
2 of what I would refer to as a static slide, something
3 like a PowerPoint slide, if you can recall?

4 A It would be very minimal. I don't recall. I
5 couldn't give you a percentage if I wanted to.

6 Q Were you involved in creating any of the ads
7 that were played on the loop?

8 A Yes.

9 Q And who did you typically work with outside of
10 Context on that?

11 A A brand manager at Novo Nordisk.

12 Q Anyone else -- Well, let me strike that.

13 Were you involved in the development of any ad
14 content for any Context loops with anyone other than
15 Novo Nordisk?

16 A I don't recall.

17 Q When you created content for the loop, how did
18 you do that? And I'm separating that from the ads.

19 A Marketing would provide me with a sheet. It's
20 generally information about various health states. I
21 would license stock footage, stock images, to create the
22 actual visuals.

23 Q How did you go about licensing that stock
24 footage?

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1 A Various stock providers.

2 Q Was all of the content on the Context loops, at
3 least during the time you worked there, licensed from
4 third parties other than that which you developed
5 yourself?

6 A I don't know.

7 Q Do you know who would know that?

8 A No.

9 Q Who did you report to?

10 A For the bulk of the time I was there, nobody.
11 With the exception of the CEO. The last six to eight
12 months, the CFO.

13 Q All right. So I'll try to read back to you what
14 I heard you to say.

15 For the bulk of the time you were there, did
16 you not have a direct report, somebody that you reported
17 to directly, or was it the CEO?

18 A I didn't have a direct report. He was the guy
19 that hired me, though.

20 Q Mr. Shah?

21 A Yes.

22 Q All right. So if you had to report anything or
23 if you had questions, would you typically go to
24 Mr. Shah?

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1 A No.

2 Q That's a bad question. It's too broad.

3 So did you periodically meet with Mr. Shah
4 during the time you worked there for him to give you
5 suggestions or guidance on job performance?

6 A No.

7 Q You made reference to the CFO. I assume that's
8 Mr. Demas?

9 A Yes.

10 Q So when Mr. Demas joined the company, then did
11 you have more of a reporting relationship with him as
12 opposed to Mr. Shah?

13 A Yes.

14 Q When you were there at Context, did Context ever
15 use content from any of its competitors for any of its
16 loops?

17 A No.

18 Q And I take it then that Context, at least when
19 you were there, to the best of your knowledge, never
20 used any content from Healthy Advice for any of its
21 loops; is that correct?

22 A That is correct.

23 Q During the time that you were with Context, did
24 you ever go to any physician's office to look at content

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1 of any of Context's competitors?

2 A No.

3 Q Did you ever ask anybody to do that?

4 A No.

5 Q Do you know if anybody ever did?

6 A I don't know.

7 Q Did you learn at some point in time that Context
8 had developed what it refers to as a switch-out package
9 or a hassle-free switch-out package dealing with
10 competitor switch-outs?

11 A Yes.

12 Q And when did you learn of that?

13 A I don't recall.

14 Q Do you recall how you learned of it?

15 A No.

16 Q What did you know about the competitor
17 switch-out package or practice?

18 A I remember it being spoken of as if you were
19 going to leave AT&T and go to Verizon, along those
20 lines.

21 Q I'm not sure I understand. So what do you mean?

22 A If I'm not happy with AT&T and I find out that
23 Verizon has better service, although I might be locked
24 into a contract about AT&T, I would see if Verizon could

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1 do anything to break that contract and allow me out of
2 their service.

3 Q And who did you learn that from at Context?

4 A I don't recall.

5 Q Did you play any role in the development of any
6 forms or any written materials directed specifically to
7 the competitor switch-out process?

8 A No.

9 Q Do you know who did at Context?

10 A No.

11 Q During the time that you were with Context, do
12 you recall there being any particular emphasis within
13 Context on switching out HAN as opposed to other
14 competitors?

15 A No.

16 Q Are you aware that in or around December of 2010
17 a HAN player was removed from a practice and shipped to
18 Context offices?

19 A Yes.

20 Q And how did you become aware of that?

21 A I recall seeing somebody's programming playing
22 in our office in Network Operations that wasn't ours.

23 Q Before that moment when you saw someone's
24 content being played at Context's Network Operations'

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1 offices, were you aware that a player -- a HAN player
2 was going to be coming to Context's offices?

3 A No.

4 Q Was your office in the same building as Network
5 Operations?

6 A Yes.

7 Q And where is that? Where was it at the time,
8 where was it located?

9 A 205 North Michigan.

10 Q Okay. Yeah, I'm asking for the address.

11 A Yeah, 205 North Michigan.

12 Q And when you said you saw someone else's content
13 playing in Network Operations, Network Operations is a
14 group within Context?

15 A Yes.

16 Q And is that Mr. Kemp's group?

17 A Yes.

18 Q Who else is in Network Operations?

19 MR. O'BRIEN: Then or now?

20 MR. COWAN: Q I'm sorry.

21 Yeah, just focusing on --

22 A Then?

23 Q Yeah, December 2010.

24 A At that time it would have been Mike Williams

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1 and potentially Coppola.

2 Q At that time -- and unless I tell you otherwise,
3 let's stay with this sort of December 2010 time frame --
4 what was Network Operations, what did they do?

5 A Network Operations would work with the
6 installers out in the field to get the players and the
7 TVs installed.

8 Q When you saw the content that you knew was not
9 Context playing in Network Operations, was it playing on
10 a monitor or a TV screen?

11 A It was on a TV screen.

12 Q And who was watching it?

13 A Nobody was watching it.

14 Q It was just playing?

15 A Yeah.

16 Without getting into too much detail, Network
17 Operations is a wide open area of the office.

18 Q Okay.

19 A And in December of 2010, there was very few
20 employees, I believe, at ContextMedia.

21 Q So describe for me the layout, the office
22 layout, if you will, at that time.

23 A It's typical.

24 The bulk of the middle is made up of cubicles.

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1 There's, I believe, three offices that face Michigan
2 Avenue, a conference room on the corner. When you
3 enter, to the right against the far wall, there's two
4 offices.

5 Q Whose were those two offices?

6 A At that time, nobody.

7 Q And then who had the offices that faced
8 Michigan?

9 A Rishi, myself, Jim Demas, and Shradha sat
10 somewhere. So maybe there was four offices there.

11 Q And then within the main part or the interior
12 part of the floor space, you said there were cubicles?

13 A Yes.

14 Q And at that time, who sat in the cubicles?

15 A Member services, of which there was probably one
16 person.

17 Q Silvia?

18 A That's correct. And the sales guys.

19 Q And then who were the sales guys at that time?

20 A I don't recall.

21 Q Was Matt Garms there at the time, do you recall?

22 A I don't think so.

23 Can I take back I don't think so? I don't
24 recall.

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1 Q That's fair.

2 MR. O'BRIEN: You can change an answer at any time.

3 THE WITNESS: Oh, okay.

4 MR. COWAN: Q Is Context still at those same
5 offices, that same location?

6 A I don't know.

7 Q When you left sometime around September of 2012,
8 were they still at that location?

9 A Yes.

10 Q Still on the same floor?

11 A Yes.

12 Q About how many feet were the salespeople's
13 cubicles from Mr. Shah's office and Mr. Demas's office?

14 A 12 feet.

15 Q And how high were the cubicles?

16 A Taking a guess, I'd say 4 feet.

17 Q When you worked there, did Mr. Shah typically
18 keep his door open?

19 A Yes.

20 Q Same with Mr. Demas?

21 A Yes.

22 Q Same with Ms. Agarwal?

23 A Yes.

24 Q How about you?

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1 A Always.

2 Q Open door policy?

3 A Yes.

4 Q How often did you typically see Mr. Shah out on
5 the floor near the salespeople on any given day?

6 A Rarely.

7 Q How about Mr. Demas?

8 A Rarely.

9 Q How about yourself?

10 A Even more rarely.

11 Q And how about Ms. Agarwal?

12 A Never.

13 Q How far was -- At that time, December of 2010,
14 how far was the Network Operations' area where the HAN
15 content was playing?

16 MR. O'BRIEN: I'll object to the form.

17 You can answer.

18 MR. COWAN: Q Yeah, let me withdraw it. That was
19 probably bad.

20 When you saw the content playing on the TV
21 screen in Network Operations in or around December of
22 2010, did you at that time determine whose content it
23 was?

24 A No.

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1 Q When did you determine that? Or did you ever
2 determine that?

3 A I don't recall.

4 Q You don't recall if you ever learned that the
5 content was HAN's?

6 A I learned of it, but I don't recall at what
7 point.

8 Q When you first saw whatever was playing in or
9 around December 2010 on the TV screen in Network
10 Operations, about how far was that screen from Mr. Shah
11 and Mr. Demas's office?

12 A I can't guess as far as feet, but it's the
13 complete opposite corner of the office.

14 Q Okay. At some point in time, did you actually
15 watch the video loop that we're talking about?

16 A Yes.

17 Q And did you watch it with Mr. Shah?

18 A No.

19 Q Did you watch it with anyone?

20 A Mike Williams.

21 Q At any time while you were watching the video
22 loop, did Mr. Shah come by to look at it?

23 A Not that I recall.

24 Q Mr. Demas?

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1 A Not that I recall.

2 Q And Ms. Agarwal?

3 A Not that I recall.

4 Q When you and Mr. Williams watched it, was it on
5 the same day that you first observed the content?

6 A I don't recall.

7 Q And what did you discuss with Mr. Williams as to
8 what you were watching?

9 A Mike wasn't actually watching it. I remember
10 asking what it was. I don't recall what was said. I
11 don't remember specifics of the conversation.

12 Q You remember asking what it was, but you don't
13 recall what was said?

14 A No.

15 Q Did you ask that question of Mr. Williams?

16 A Yes.

17 Q And you said he wasn't watching it. What was he
18 doing?

19 A He was facing his computer monitor, I think, as
20 usual. And I'll give a little bit additional.

21 I recall saying; when this is playing, let me
22 know. I'd like to see it. And I went back to my
23 office.

24 Q What caused you to ask him to alert you when it

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1 was playing? What was it about it that you wanted to
2 see?

3 A It wasn't our content.

4 Q Were you able to tell fairly quickly by looking
5 at it that it was Healthy Advice content?

6 A Yeah. Within a millisecond, yeah.

7 Q Because it says Healthy Advice?

8 A Oh, excuse me. I'd like to take that back.

9 Not that it was Healthy Advice, just that it
10 was content that was -- I hadn't seen it before, and I'm
11 the content manager.

12 Q But doesn't the Healthy Advice loop indicate on
13 the loop that it's Healthy Advice content at some point?

14 A At some point.

15 Q Do you recall how long the loop was -- Let me
16 strike that.

17 So I'm a little confused about the conversation
18 you had with Mr. Williams where you said when this is
19 playing again, let me know.

20 Had it stopped playing?

21 A Yeah. I mean, there is numerous resets, which
22 is common.

23 Q Numerous what?

24 A Player resets.

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1 Q What's that?

2 A Digital players, when they're hooked up, if they
3 don't have a network signal, my understanding is that
4 there's resets. It was a consistent problem with
5 members out in the field as well.

6 Q With members out in the field with respect to
7 the HAN player or with everyone's?

8 A With respect to ContextMedia's players.

9 And, generally, member services would ask me
10 what's going on, and I would have to get in the middle
11 between member services and Network Operations. It was
12 frequent.

13 Q And what did you determine was the issue?

14 A No idea. It's Network Operations'
15 responsibility. I just put the content on there.

16 Q All right. So at some point did Mr. Williams
17 call you or alert you that it was playing again?

18 A He must have.

19 Q And what do you recall about your observations
20 at that time?

21 A The quality of the programming?

22 Q Sure.

23 A It seemed like a relic of the late '90s. It was
24 amateur-ish and devoid of much information.

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1 Q Did you discuss with anyone at Context the idea
2 of recording, video recording the HAN loop?

3 A No.

4 Q Did you do so?

5 A Yes.

6 Q Did you video record it?

7 A Yes.

8 Q Why did you do that?

9 A As somebody in the digital home space,
10 developing health care for people sitting in waiting
11 rooms, I have no idea what anybody else is looking at.
12 So it was in my interest to see how we were doing.

13 And seeing that programming made me feel like I
14 was doing a pretty good job.

15 Q Seeing the HAN programming as compared to what
16 you were doing, you felt Context was doing a pretty good
17 job?

18 A Yes.

19 Q Why was there a need -- If the HAN content was a
20 relic of the '90s and outdated, why was there a need to
21 video it?

22 A I didn't stand there and watch it. I was just
23 videotaping it. I had other things to do in the office.
24 It was for a record for myself.

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1 Q Right. Why did you want a record of it for
2 yourself?

3 A As a reference of what else is out there for
4 health care programming.

5 Q And why was it -- Why did you feel that it would
6 be helpful to have a reference of what else was out
7 there for health care programming?

8 A When I worked at a political consulting firm, I
9 wanted to see everybody else's spots from any other
10 shops. And this was the same exact thing.

11 Q How did you do that at the political consulting
12 firm?

13 A YouTube.

14 Q Did you have any discussions with anybody at
15 Context about why it was that a HAN player was in
16 Context's offices?

17 A Not that I recall.

18 Q That did not strike you as the least bit odd?

19 A I mean, it would be an assumption. But it would
20 go along with the switch-out program, right?

21 Or it was my assumption.

22 Q Are you aware that Context took an image of the
23 hard drive of the HAN player?

24 A Yes.

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1 Q And how are you aware of that?

2 A Through an e-mail I recently saw.

3 Q Did you have any discussions at any time with
4 anyone at Context about the imaging of the HAN hard
5 drive?

6 A No.

7 Q Do you know who did the imaging of the HAN hard
8 drive?

9 A Mike Williams.

10 Q How do you know that?

11 A Because he's like the only one in the office
12 that knows what a disk image is.

13 Q Do you know how it is that he imaged the HAN
14 hard drive?

15 A No.

16 Q Did he ever discuss with you at any time ever
17 utilizing a tool called image for Linux?

18 A No.

19 Q Are you familiar with that tool?

20 A No.

21 Q So other than the e-mail that you saw that
22 referenced the image of the HAN hard drive, did you have
23 any other discussions, any other communications, oral or
24 written, with anybody at Context about the HAN hard

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1 drive or the Context image of that hard drive?

2 A Not that I recall.

3 Q Did you ever look at any of the content of the
4 hard drive?

5 A No.

6 Q Do you know if anybody else at Context did?

7 A No. And for no I mean I don't know.

8 Q Did you have any discussions at any time with
9 Mr. Shah about the video loop that you recorded of the
10 HAN -- I'm sorry.

11 Did you have any discussions with Mr. Shah at
12 any time regarding the video recording of the HAN loop
13 you made?

14 A Not that I recall.

15 Q When you learned that Context had made an image
16 of the HAN hard drive, did that cause you any concern?

17 A No.

18 Q Do you have any idea what's on the HAN hard
19 drive?

20 A Player software.

21 Q Do you, as you sit here today, know whether or
22 not there's any HAN intellectual property on the HAN
23 hard drive?

24 MR. O'BRIEN: I'll object to the form.

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1 You can answer.

2 THE WITNESS: No.

3 MR. COWAN: Q Do you know whether or not there's
4 any confidential information on the HAN hard drive?

5 A I don't know.

6 Q Did you -- When you watched the HAN loop, was it
7 just one loop, meaning one 30-minute loop that you
8 recorded?

9 A Yes.

10 Q There weren't multiple iterations or different
11 loops that you saw?

12 A No.

13 Q Did you ever hear anyone at Context express any
14 concerns about the fact that Context had imaged the HAN
15 hard drive?

16 A No.

17 Q After you took the video of the HAN loop, what
18 did you do with the video?

19 A Stored it locally on my hard drive.

20 Q How did you do that?

21 A It came from a digital camera. So it was an
22 MPEG-4 file.

23 Q And did you do anything with the video that you
24 stored locally on your computer?

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1 A At some point I put it up onto the server.

2 Q Do you recall when?

3 A Not when, no.

4 Q Do you have any approximation as to how long
5 after you recorded the loop that you put it up on the
6 server?

7 A I don't recall.

8 Q Did anyone ask you to put the video onto the
9 server?

10 A Marketing did, yes.

11 Q And who's marketing?

12 A At the time it would have been Jeana and Darcy.

13 Q Jeana Loewe?

14 A Yes.

15 Q Did they both ask you or did one of them ask
16 you?

17 A It would have been Darcy who would have asked
18 me.

19 Q And what did Darcy ask you to do?

20 A Make it available to marketing.

21 Q And how did you make it available to marketing?

22 A I copied the MPEG-4 file onto the server into
23 the marketing folder.

24 Q When you watched the 30-minute HAN loop, were

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1 you able to tell how much of that 30 minutes was
2 advertising?

3 A Not offhand.

4 Q What do you mean by not offhand?

5 A I didn't have a stopwatch with me.

6 Q Okay. That's what I thought you meant.

7 A Okay.

8 Q So if someone was watching the 30-minute loop,
9 the HAN loop, and had a stopwatch or a watch that has a
10 chronograph or a phone that has a stopwatch on it, they
11 would be able to determine how much of the 30 minutes
12 was advertising?

13 A Yes.

14 Q It would be very simple?

15 A Yes.

16 Q Did anyone at ContextMedia, other than you, to
17 your knowledge, look at the loop that you had recorded?

18 A Not to my knowledge.

19 Q Do you recall whether or not new salespeople at
20 Context were ever asked to review that video loop?

21 A I don't know.

22 Q I'm going to show you a few documents, and then
23 we'll be done.

24 (Exhibit 60 marked as requested.)

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1 MR. COWAN: Q I've handed you what we've marked as
2 Plaintiff's Exhibit 60. Take a minute and look at that,
3 and tell me if you recall that e-mail.

4 A I don't recall that e-mail.

5 Q Down at the bottom there's an e-mail from Elina
6 Yankovich --

7 A I don't think we're looking at the same
8 document.

9 Q Okay. I've got the wrong document then, sorry.
10 So P60 should be an e-mail from you to
11 Ms. Agarwal dated October 14th of 2010, correct?

12 A Correct.

13 Q But you don't recall this e-mail?

14 A No.

15 Q Do you recall what screen gallery is?

16 A No.

17 Q What about PS'd, do you know what that stands
18 for?

19 A I don't.

20 MR. COWAN: Okay. Let's go ahead and mark that 61.

21 (Exhibit 61 marked as requested.)

22 MR. COWAN: Q Take a minute and look at Exhibit
23 P61, and see if that's an e-mail that you're familiar
24 with.

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1 A Okay.

2 Q Do you have any recollection of this e-mail or
3 the subject?

4 A No.

5 Q And I don't know if I'm reading it right or
6 pronouncing it right, Elina Yankovich with
7 hyperspacedigital.com, is that familiar to you at all?

8 A No.

9 MR. COWAN: All right. P62, I think.

10 (Exhibit 62 marked as requested.)

11 MR. COWAN: Q Take a minute and look at Exhibit
12 P62, which is an e-mail -- it's an e-mail thread, but at
13 the top it's from Mr. Williams to Mr. Shah and to you
14 dated January 6th of 2011.

15 Are you familiar with this e-mail?

16 A I am familiar with it.

17 Q And I take it this is the e-mail that you
18 referenced earlier in your testimony where you said this
19 is how you learned that Context had taken an image or
20 made an image of the HAN hard drive?

21 A That is correct.

22 Q And your e-mail that is earlier in the string
23 indicates what I think you've talked to us about
24 earlier, about putting a video of the HAN loop up on the

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1 server. Is that fair?

2 A That's fair.

3 Q I think I understand your last paragraph, but I
4 want to make sure.

5 It says we have the Healthy Advice loop, paren,
6 shot off the screen with the Flip camera. That's
7 actually you sitting with a Flip camera and recording
8 what you were watching on the screen, correct?

9 A I didn't sit with a Flip camera or while it
10 recorded.

11 Q Okay. You actually put some sort of a video
12 recorder on a stand or a pod?

13 A No. It was on a chair, I believe.

14 Q Okay. And then two of their promo videos, do
15 you know what that's referring to?

16 A I don't.

17 Q And then you say, we also now have the loop
18 pulled from the WRP, Waiting Room Promotions, website.
19 Is that something separate from HAN, WRP?

20 A I don't know.

21 Q You just don't recall at this point?

22 A I don't recall at this point.

23 (Exhibit 63 marked as requested.)

24 MR. COWAN: Q I've handed you what we've marked as

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1 Plaintiff's Exhibit 63. It starts with -- at least the
2 top of the page, the first page, is an e-mail from
3 Silvia Velazquez to herself Monday, January 24th, 2011.
4 But the first sort of original message is from Mr. Shah
5 to you January 21, 2011.

6 Take a minute and just review that e-mail
7 string to yourself. I've got a few questions about it.

8 And the first question I'll have for you,
9 Mr. Berning, is just simply whether or not you recall
10 this.

11 A I don't recall this e-mail.

12 Q Okay. Let me just ask you a few questions.

13 On the page -- We've got what attorneys refer
14 to as Bates numbers. So down in the lower right-hand
15 corner of the page, it'll say Context PROD. Do you see
16 that?

17 A Yes.

18 Q So if you could look at the page that's marked
19 13339, which is essentially the third page.

20 And in Ms. Velazquez's e-mail that's on
21 January 19th, 2011, the second full paragraph, she says
22 most of our programming now requires the volume to be
23 turned up. Do you see that?

24 A Yep.

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1 Q And then she asks, a couple more sentences in;
2 for example, adding more information in the form of
3 PowerPoint slides so that patients can read it and it
4 not require volume. Similar to Healthy Advice, for
5 example.

6 Do you recall doing that for any of Context's
7 content at any time after this e-mail? And by that I
8 mean adding more PowerPoint slides to Context content.

9 A I'd need clarity, because a PowerPoint slide
10 isn't video.

11 So, no, we never used slides.

12 Q Did you use anything that was static and
13 non-video after this time? Did you add anything like
14 that to the content?

15 A I don't recall.

16 Q You could have, you just don't recall?

17 A Yeah, could have.

18 Q There's a reference in Mr. Shah's e-mail that I
19 think comes after Silvia's e-mail. So it's on the page
20 13338, down at the bottom. The last paragraph that's on
21 that page.

22 He says, I would tender that we can create a
23 program that's appropriate for such an E-N-V-I-R, which
24 I assume is environment, either through motion graphics,

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1 closed captioning, or some combination. Do you see
2 that?

3 A Yeah.

4 Q What is motion graphics?

5 A Motion graphics would be animated logos, type
6 treatments that move.

7 Q I'm sorry, I missed that. Tight treatments?

8 A Type treatments.

9 When you turn on sports or baseball game or
10 whatever, all the stuff that leads into the actual
11 programming.

12 Q All right. Then in your e-mail to Mr. Shah
13 that's on the first page, Bates number 13337, on
14 January 20th of 2011, in the second full sentence of
15 your e-mail you say:

16 The idea here is to work up some Healthy
17 Advice-esque motion graphics treatments to help fill out
18 the loop, as our library is limited. And I was
19 struggling to create a 90-minute loop that was fresh.

20 What do you mean there when you say Healthy
21 Advice-esque motion graphics treatments?

22 A I think you can cut the word Healthy
23 Advice-esque out, and just leave it at motion graphics.
24 Meaning visual information that needs no audio.

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1 Q Why would I cut the words Healthy Advice-esque
2 out if those are your words?

3 A Why would you cut it out?

4 Q Yeah.

5 I mean, you said you would cut out the words
6 Healthy Advice-esque.

7 A I would cut them out, specifically now, because
8 I wouldn't compare what I did to Healthy Advice.

9 Q What is it that you did?

10 A I think I had a better eye for design than what
11 I saw on their screen.

12 Q No, I got it. But what is it that you actually
13 did with respect to motion graphics?

14 A I developed content that was readable as opposed
15 to hearable.

16 Q To fill up the 90 minutes?

17 A That's correct.

18 Q And what did you do with that content that you
19 developed that was readable to fill up the 90 minutes?
20 What did you do with it, did you put it in the loop?

21 A I'm sure it was reviewed; but yes, after it was
22 reviewed and okayed.

23 Q Do you recall what it was that you -- what the
24 content was?

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1 A I don't.

2 Q You say, I can see a version of the loop with
3 some content being slide format style where volume
4 wouldn't matter.

5 Did you create that?

6 A Can you repeat that?

7 Q You say in the next sentence there in your
8 e-mail, I can see a version of the loop with some
9 content being slide format style where volume wouldn't
10 matter. Except for our network's sponsor, where audio
11 is key to the delivery of their message.

12 Did you create what you saw as a version or
13 content being slide format style?

14 A I did.

15 Q And did that find its way into the 90-minute
16 loop that was provided to members, practices?

17 A Yes.

18 Q Then you say: That said, if the sponsor is on
19 board with running their ad on mute, or using an
20 alternate version of their ad for this sans-sound-loop,
21 paren, i.e. slides with their messaging and disclaimers,
22 et cetera, that are compliant with any regulations a'la
23 the sponsors on Healthy Advice, then great.

24 What do you mean by a'la the sponsors on

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1 Healthy Advice?

2 A I don't recall.

3 Q All right. Mr. Shah responded to you, and he
4 says: I think your motion graphics idea is the one to
5 pursue.

6 I take it that after Mr. Shah told you that,
7 that's when you pursued the motion graphics idea that
8 we've talked about?

9 A I don't recall, but most likely.

10 Q You'll see in the last paragraph of Mr. Shah's
11 e-mail there he says: Let's see if the office will take
12 a system at no volume. If so, it may give us the
13 opportunity to develop such a service and add it to our
14 portfolio of offerings, as I suspect there is adequate
15 demand from a number of offices I've seen that are
16 concerned about audio.

17 Did Context develop a no-audio format and
18 no-audio loop at any time while you were there?

19 A Yes.

20 Q How soon after this e-mail was that done?

21 A It would have been in early 2012, I would guess.

22 Q So a year later?

23 A Yeah.

24 Q Do you recall what it is that -- Was there any

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1 precipitating event or precipitating factor that you're
2 aware of that caused Context to develop a no-audio loop
3 in early 2012?

4 A It was a request from Silvia. And at that point
5 they were -- you know, we were developing new networks.
6 So to have another loop offering.

7 Q Do you recall, was that for the RHN, the
8 rheumatoid network, or some other network?

9 A Yes, RHN.

10 (Exhibit 64 marked as requested.)

11 MR. COWAN: Q Mr. Berning, I've handed you what
12 we've marked as Plaintiff's Exhibit 64. It's an e-mail
13 from Ms. Velazquez dated April 14th of 2011 to Mr. Shah
14 and a number of other people, including yourself. The
15 subject is RHN - 30,106 - Member Feedback.

16 Take a minute and just read that to yourself,
17 if you would. I'll just have a few questions about it.

18 A Yep.

19 Q Do you have any recollection of this e-mail or
20 the subject matter of it?

21 A No.

22 Q Okay. Then let me just ask you.

23 In the e-mail there's four bullet points. The
24 third bullet point, about the middle of the way through,

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1 Ms. Velazquez -- And Ms. Velazquez here, as you
2 understand it, is referring to a conversation she had
3 with someone in the office that had a HAN player but was
4 being switched out. Is that fair?

5 A That's fair, yeah.

6 Q And then what Ms. Velazquez is saying in that
7 third bullet point, about halfway through she said:

8 Regardless, she, and referring to the person at
9 the practice, sounded very interested in our development
10 of the silent loop.

11 As you sit here today, does this help refresh
12 your recollection as to whether Context was in the
13 process of developing a silent loop at or around this
14 time?

15 A April 14th of 2011?

16 Q Yes.

17 A No.

18 Q Okay. Who at Context was primarily responsible
19 for the development of the silent loop content?

20 A Marketing and member services.

21 (Exhibit 65 marked as requested.)

22 MR. COWAN: Q Plaintiff's 65 is an e-mail string
23 that starts with an e-mail from Mr. Shah to you on
24 May 2nd, 2012. The subject is meeting with Steven

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1 Jackson at Pfizer May 9th. Re: RHN exam rooms.

2 Take a minute and just read this to yourself,
3 and I'll have a few questions about it.

4 A Yep.

5 Q Do you have any recollection of this e-mail or
6 the subject matter?

7 A No.

8 Q Do you recall working on developing an exam room
9 strategy for Context while you were there?

10 A No.

11 Q Do you have any recollection of others within
12 Context having been involved in the development of an
13 exam room offering while you were there?

14 A No.

15 Q Do you have any recollection, as you sit here
16 today, what, if anything, you did in response to
17 Mr. Shah's request that's set forth in P65?

18 A No.

19 (Exhibit 66 marked as requested.)

20 MR. COWAN: Q Exhibit P66 is an e-mail from you to
21 Mr. Shah May 2nd of 2012. I think it's a follow-on to
22 the e-mails that we looked at before.

23 Take a minute and just read the first page, if
24 you don't mind, because I think the rest is probably

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1 duplicative of what you saw before.

2 A Okay.

3 Q Are you familiar with this e-mail?

4 A Yes.

5 Q Having looked at this e-mail, does this help
6 refresh your recollection as to what it is that you did
7 in follow-on to Mr. Shah's request?

8 A No.

9 Q Does it appear as if -- Okay. Let's just take a
10 look at the first sentence.

11 You say: Hi Rishi, after taking a look at the
12 HAN loop we caught, here is a breakdown and linked
13 visual references of each of the three ads that were
14 playing; Humira, Singulair, and Uloric.

15 I take it what you're referring to there, when
16 you say the HAN loop we caught, is the recording of the
17 video that we've talked about earlier?

18 A Yes.

19 Q So at least as best you read this, do you
20 believe that what you did is you went back and looked at
21 that recording to prepare the information that you have
22 here for Mr. Shah?

23 A Can you repeat that?

24 Q If it was confusing, I'll reword it. If you

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1 just want --

2 A Yes.

3 Q It was confusing?

4 A Yes.

5 Q Okay. Looking at the content of your e-mail,
6 the description of the Humira, Singulair, and the Uloric
7 ads, do you believe, looking at this, that what you did
8 is you went back and looked at the HAN loop that you had
9 recorded that was stored on the server in order to get
10 this information?

11 A I must have.

12 Q But as you sit here today, you just have no
13 independent recollection of doing that?

14 A I've worked at ad agencies. I mean, this is --
15 Do I recall sitting there and doing this and do I recall
16 Rishi asking me to do this, no.

17 Q Okay. Do you have any recollection of -- Well,
18 let me strike that.

19 If you didn't have access to the HAN recording
20 that you made, would you have been able to provide this
21 information to Mr. Shah relative to the HAN content?

22 A I wouldn't have been able to, no.

23 Q And I don't want to belabor the point. So let
24 me just ask it, so I can close the loop here.

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1 Do you have any recollection of how long it
2 took you to get this information?

3 A I don't have any recollection of that, no.

4 MR. COWAN: Can we take a break and let me just talk
5 to Manuj here?

6 MR. O'BRIEN: Sure.

7 (discussion had off the record.)

8 MR. COWAN: Q I've got a few more questions.

9 A Sure.

10 Q So starting when you started there in 2009, how
11 was the content delivered to the offices, to the
12 practices?

13 A Oh, to our members?

14 Q Yeah.

15 A It was digital distribution.

16 Q What's that mean?

17 A We would use a content management system.
18 Specifically, it's BroadSign.

19 They have software that -- I had a local
20 application. I would upload things to some server. And
21 I could tell these different content pieces what screens
22 to touch and when and how often.

23 Q And who was that that provided that service?

24 A BroadSign. It's a Canadian company. And it's a

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1 digital signage content management system.

2 Q Did how you delivered the content change at all
3 over the period that you worked there?

4 A In regards to scheduling ads, ad campaigns.

5 Q But, I mean, did you continue to use BroadSign
6 the entire time you were there?

7 A Yes.

8 Q Was Context able to communicate with the various
9 practices remotely in order to make changes to
10 content --

11 A Yes.

12 Q -- that was at the offices remotely?

13 A Uh-huh.

14 Q How did you do that?

15 A Well, the player is connected to a network. The
16 player reaches out to the network X amount of times per
17 24 hours. If I had scheduled something to that player,
18 the next time it touches the network, it says, oh, you
19 need to play this.

20 Q And do you know -- When you worked there, did
21 you have an understanding of what software was utilized
22 by the Context player? The operating system, how it
23 worked?

24 A Oh, no.

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1 I know what the operating system was. It was
2 Ubuntu, which is Linux based.

3 Q Okay. But in terms of describing the make up of
4 the Context CPU, you know, what made it run, how it ran,
5 do you know any of that information?

6 A No.

7 Q Is that a Mike Williams question?

8 A Yes.

9 Q Do you know whether or not there were any
10 changes to the Context CPU and how it functioned, how it
11 performed, during the time you worked there?

12 A I don't know.

13 Q What was your experience before you got to
14 Context in developing digital operating systems for TV
15 screens?

16 A You mean digital content?

17 Q Yeah, digital content.

18 A None. I'd been in broadcast prior to that.

19 Q And how did you learn how to build digital
20 operating systems for digital content for screens when
21 you were at Context?

22 A Can you reword that?

23 Q Sure.

24 I think what you said is, you were in broadcast

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1 before you joined Context, correct?

2 A Correct.

3 Q And, therefore, you didn't have any experience
4 in developing digital content for use on -- as you do at
5 Context.

6 Is that still confusing?

7 A No.

8 Are you asking how did I learn what I did at
9 Context?

10 Q Yes.

11 A Trial and error.

12 Q When you worked at Context, did you hold any
13 stock or were you given any stock in the company?

14 A I wasn't.

15 Q And do you have any at this time?

16 A No.

17 Q But in terms of just -- And I don't want to
18 rehash anything, but in terms of whatever software
19 that's in the Context CPU, any software that it uses to
20 either compress content, that sort of thing, do you have
21 any knowledge of that?

22 A No.

23 Q Did you play a role in developing any of that?

24 A No.

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1 MR. COWAN: I think we're good. Thank you very
2 much, sir.

3 THE WITNESS: Thank you.

4 EXAMINATION

5 by Mr. O'Brien:

6 MR. O'BRIEN: Q Mr. Berning, before you ever saw
7 the HAN loop, didn't you on occasion create slide-like
8 content for ContextMedia?

9 A Yes.

10 Q And how much content did ContextMedia have,
11 approximately?

12 A Easily, 4 terabytes. That's compressed video.
13 If not upwards of 8.

14 Q And each member practice doesn't get the same
15 loop, right?

16 A No.

17 Q They're customized by region of the country, by
18 condition, and a whole bunch of other factors?

19 A That's correct.

20 Q And it's changed every month?

21 A If not more than that, yes.

22 Q And pull out Plaintiff's 63, please, again.

23 Do you recall this document?

24 A Yes.

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1 Q And I believe you testified, after some
2 questions about this document, that in response to this
3 activity, you created some more slide-like content?

4 A Yes.

5 Q And wasn't that slide-like content for this
6 specific physician?

7 A Yes.

8 Q So it's not distributed to all the members?

9 A No.

10 Q And I think you testified to this, too. But
11 just to be sure, you never copied any HAN content?

12 A No.

13 Q Were you pausing over the fact that you made
14 that video loop?

15 A Yes.

16 Q Okay. But you never copied any HAN content in
17 order to create ContextMedia content?

18 A Define copy.

19 Q You never looked at HAN content to make
20 something like it for ContextMedia?

21 A No.

22 Q And you never made an actual copy of HAN content
23 and then put it in a loop for ContextMedia?

24 A No.

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1 MR. O'BRIEN: I have nothing further.

2 FURTHER EXAMINATION

3 by Mr. Cowan:

4 MR. COWAN: Q I may have asked you this. And if I
5 did, I apologize.

6 Do you have any recollection as to how many
7 times you looked at the HAN video loop while you were at
8 Context?

9 A No.

10 Q Was it more than a handful?

11 A Less than a handful.

12 MR. COWAN: That's all I have.

13 MR. O'BRIEN: Signature reserved.

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1 STATE OF ILLINOIS)
2) ss:
3 COUNTY OF C O O K)
4
5

6 The within and foregoing deposition of the
7 aforementioned witness was taken before MARINA
8 MOGILEVSKY, C.S.R., and Notary Public, at the place,
9 date and time aforementioned.

10 There were present during the taking of the
11 deposition the previously named counsel.

12 The said witness was first duly sworn and was
13 then examined upon oral interrogatories; the questions
14 and answers were taken down in shorthand by the
15 'undersigned, acting as stenographer and Notary Public;
16 and the within and foregoing is a true, accurate and
17 complete record of all of the questions asked of and
18 answers made by the aforementioned witness, at the time
19 and place hereinabove referred to.

20 The signature of the witness was not waived,
21 and the deposition was submitted, pursuant to
22 Rules 30 (e) and 32 (d) of the Rules of Civil Procedure
23 for the United States District Court, to the deponent
24 per copy of the attached letter.

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1 The undersigned is not interested in the
2 within case, nor of kin or counsel to any of the
3 parties.

4 Witness my official signature and seal as
5 Notary Public in and for Cook County, Illinois, on
6 this _____ day of _____, _____.

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MARINA MOGILEVSKY, C.S.R.,
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

HEALTHY ADVICE NETWORKS,)
LLC,)
)
Plaintiff,)
)
-vs-) No. 1:12-CV-00610
)
CONTEXTMEDIA, INC.,)
)
Defendant.)

I, MICHAEL BERNING, being first duly sworn,
on oath say that I am the deponent in the aforesaid
deposition taken on March 6th, 2014; that I have read
the foregoing transcript of my deposition, consisting
of Pages 1 through 54.

MICHAEL BERNING

SUBSCRIBED AND SWORN TO
before me this ____ day
of _____, A.D. 2014.

Notary Public

Healthy Advice Network LLC vs. Comtextmedia Inc.
Michael Berning March 6, 2014

MERRILL LEGAL SOLUTIONS
311 South Wacker Drive - Suite 300
Chicago, Illinois 60606
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March 10, 2014

Mr. Michael Berning
c/o Sidley Austin LLP
One South Dearborn Street
Chicago, Illinois 60603
ATTN: Mr. Richard J. O'Brien

RE: Healthy Advice Networks vs ContextMedia,
Inc. - Case No. 1:12-cv-00610
DEP: Mr. Michael Berning (taken 3-6-14)

Dear Mr. O'Brien:

The above referenced deposition has been transcribed and is ready for review, pursuant to the Rules of Court.

Please contact our office at your earliest convenience for an appointment to review the deposition transcript or you may contact counsel for a copy of the transcript for your review.

Upon failure to comply within 30 days, we shall forward an appropriate affidavit of noncompliance to counsel without further notice.

Very truly yours,

MERRILL CORPORATION

cc: Mr. Grant S. Cowan (Frost Brown) Inv. MM219643

Healthy Advice Network LLC vs. Comtextmedia Inc.
Michael Berning March 6, 2014

CASE: Healthy Advice Networks vs ContextMedia

DEPONENT: MICHAEL BERNING

DATE: 03-06-14

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Reporter: MARINA MOGILEVSKY, C.S.R.,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

HEALTHY ADVICE NETWORKS,)
LLC,)
)
Plaintiff,)
)
-vs-) No. 1:12-CV-00610
)
CONTEXTMEDIA, INC.,)
)
Defendant.)

I, MICHAEL BERNING, being first duly sworn,
on oath say that I am the deponent in the aforesaid
deposition taken on March 6th, 2014; that I have read
the foregoing transcript of my deposition, consisting
of Pages 1 through 54.



MICHAEL BERNING

SUBSCRIBED AND SWORN TO
before me this _____ day
of _____, A.D. 2014.

Notary Public

Healthy Advice Network LLC vs. Comtextmedia Inc.
Michael Berning March 6, 2014

MERRILL LEGAL SOLUTIONS
311 South Wacker Drive - Suite 300
Chicago, Illinois 60606
(312) 386-2000

March 10, 2014

Mr. Michael Berning
c/o Sidley Austin LLP
One South Dearborn Street
Chicago, Illinois 60603
ATTN: Mr. Richard J. O'Brien

RE: Healthy Advice Networks vs ContextMedia,
Inc. - Case No. 1:12-cv-00610
DEP: Mr. Michael Berning (taken 3-6-14)

Dear Mr. O'Brien:

The above referenced deposition has been transcribed and is ready for review, pursuant to the Rules of Court.

Please contact our office at your earliest convenience for an appointment to review the deposition transcript or you may contact counsel for a copy of the transcript for your review.

Upon failure to comply within 30 days, we shall forward an appropriate affidavit of noncompliance to counsel without further notice.

Very truly yours,

MERRILL CORPORATION

cc: Mr. Grant S. Cowan (Frost Brown) Inv. MM219643

Healthy Advice Network LLC vs. Comtextmedia Inc.
Michael Berning March 6, 2014

CASE: Healthy Advice Networks vs ContextMedia

DEPONENT: MICHAEL BERNING

DATE: 03-06-14

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DATE 04/09/14

Reporter: MARINA MOGILEVSKY, C.S.R.,